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Supreme Court, U.S.
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No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY

MICHAEL A. FELDMAN
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Petitioners

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PETITIONERS' REPLY

The government's insistence that the decision of the Federal Circuit in this case does not merit review rests principally on a reading of the lower courts' opinion that alters that opinion almost beyond recognition. The government suggests that the lower courts merely held that service members who "willfully" failed to comply with weight or fitness requirements may be deemed to have been discharged "voluntarily." And it asserts that the courts reached this conclusion simply by applying normal interpretive techniques to "construe" ambiguous statutory and regulatory language.

What the lower courts actually held, however, is that the Defense Department may treat *all* weight or fitness discharges as "voluntary," regardless of how hard a service member tried to comply with the services' standards. They did so based not on any *construction* of the applicable agency regulation, but on the *substitution* of unpublished memoranda for the terms of the regulation. Although this is the most striking feature of the opinions below, the government virtually ignores it and completely fails to defend it. The brief in opposition cites *not one* precedent that permits elevation of unpublished agency documents over published regulations. Nor does it convincingly reconcile the outcome below with the governing statute or its legislative history. The Court should grant review of this case, which is of great importance to thousands of men and women who served their country in its armed forces, not only to resolve the proper interpretation of the statutes at issue, but also to address the lower courts' extreme departure from basic administrative-law precedents governing review of agency actions by the federal courts.

1. The recoupment statutes require service members who, "voluntarily, or because of [their] misconduct," do not fulfill their service obligation to refund portions of their enlistment and reenlistment bonuses. 37 U.S.C. § 308(d)(1). The government distorts the meaning of the statutes, its own practices, and the record when it contends that a weight or

fitness discharge must be deemed "voluntar[y]" under the statutes because "[t]here is no reason why a service member who willfully engages in conduct (or refrains from conduct) *knowing* that it will result in his separation from the Service ... does not 'voluntarily' fail 'to complete the term of enlistment.'" Govt. Br. 10-11. The government's argument is irrelevant because neither the government's practice of seeking recoupment from discharged service members nor the ruling of the courts below is limited to members whose failure to meet weight or fitness standards is "willful."

As explained in our petition (at 6), and nowhere denied in the government's brief (*see* S. Ct. R. 15.2), it is undisputed that the petitioners were *not* discharged for failing to make a good faith effort to comply with applicable weight or fitness standards. Thus, petitioners did not engage in "willful" conduct "knowing" it would cause them to fail. Indeed, they were not discharged for engaging in (or refraining from) any *conduct* at all, but simply because their otherwise satisfactory efforts to comply with weight or fitness standards *did not ultimately succeed.*[1] Under the government's reasoning, any lawyer who failed a bar exam could be said to have "voluntarily" failed to join the bar because (1) he knew the consequences of failing the exam, and (2) he might have passed if he had studied harder. The government's assertion that any failure to meet the armed forces' rigorous weight and fitness standards is necessarily "voluntary" (and even "willful") merely because "volitional" conduct (for example, eating and exercising) *affects* service members' ability to comply with those standards reflects not only an unreasonable reading of the statute, but also a basic ignorance of human nature.

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[1] The government's suggestion that it "benefitted" petitioners by not discharging them for "misconduct," Govt. Br. 12 n.7, is downright offensive. There is no possible basis in the record for concluding that they engaged in "misconduct" under the statute. *See* Pet. App. 9a n.9. Indeed, anyone who did is excluded from the plaintiff class. *See* Pet. 7.

2. The government's assertion that there is no disagreement among the courts over the interpretation of the statute is equally untenable. The courts below said that they "respectfully disagree with the court in *Iliff v. Schlessinger*, 539 F.2d 1275 (10th Cir.1976)." Pet. App. 19a-20a, n.18. In contrast to the lower courts here, which accepted the government's argument that the statutory term "voluntarily" is ambiguous, the Tenth Circuit in *Iliff* agreed with the government's assertion there that the ordinary meaning of the term refers to the member's departure from the service, not to whether the conduct that led to the discharge was volitional. *See also* J.A. 525-26 (government brief in *Iliff*). Whatever the factual differences between the cases, they reflect directly opposed views of the meaning of the statute.

The government's assertion (Govt. Br. 14 n.9) that the result below can be reconciled with *United States v. Gears*, 835 F. Supp. 1093 (N.D. Ind. 1993), is also wrong. Although the court there mentioned that the service member had not been warned that his weight problem could lead to discharge, its holding was based on its rejection of the government's theory, adopted by the lower courts in this case, that a discharge is "voluntary" for recoupment purposes whenever it is related to conduct that is "volitional in that it was not caused by disease or physical defect." *Id.* at 1093. Moreover, the government apparently concedes that the interpretation of the statute below is inconsistent with that in *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001), for it makes no effort to reconcile them. *See* Govt. Br. 14 n.9. *Hensala*, consistent with *Iliff*, held that a service member's intention to bring about his own discharge is essential to any "voluntary" discharge under the recoupment statutes — a holding that would require a different result in this case.

The government claims that these divergent results in the district courts should not affect this Court's decision whether to grant certiorari because district court decisions "have no precedential effect." Govt. Br. 14 n.9. But this Court has of-

ten viewed divergent district court decisions as indicating a need for guidance, especially where important federal statutes or policies are at issue. *See, e.g., Gonzaga University v. Doe*, 536 U.S. 273, 278 & n.2 (2002); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999); *King v. St. Vincent's Hospital*, 502 U.S. 215, 218 n.7 (1991); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981). As these examples show, the district courts' disagreement with the courts below, coupled with the disagreement between the circuits, reinforces the need for review.

3. The government repeatedly says legislative history supports its view that the statutes require recoupment from service members discharged for weight and fitness reasons. But although the statutory term "voluntarily" may admit some ambiguity at the margins, it cannot be stretched to encompass concededly involuntary discharges of members who, far from seeking to be discharged, have made good faith efforts to remain in the service. Even if the government correctly characterized the legislative history, legislative history cannot alter a statute's unambiguous terms. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 456-62 (2002).

In any event, the government's legislative history argument is wrong. The relevant language has been used repeatedly not only in the statutes at issue, but also in others requiring refunds when members leave the services early. *E.g.*, 10 U.S.C. § 2005(a)(3); 37 U.S.C. § 309; 38 U.S.C. § 7432; 38 U.S.C. § 7458. Congress has referred to this language as "the standard provision for a refund." H.R. Rep. No. 93-857 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2984, 2997. Despite the long history of congressional use of this language, the only support the government offers for its position is a single phrase in a 1951 committee report. That report, discussing a prior version of one of the recoupment statutes, does not ad-

dress weight, fitness or similar involuntary discharges *and does not even purport to interpret the language actually enacted by Congress* — it merely characterizes a communication from the Bureau of the Budget. *See* S. Rep. No. 82-935 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2464, 2466.

Nowhere does the government acknowledge that the *only* legislative history that specifically addresses the issue before the Court is a 1980 Senate report citing the Defense Department's assurance that it was "*not* the intent of this proposal to include situations where an individual is discharged ... because of ... *failure to meet physical standards* or hardship." S. Rep. No. 96-850 at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2833, 2840 (emphasis added). That same year, the very Congress that received that assurance amended and extended the terms of the bonus statutes, which contained the identical recoupment language. *See* Pub. L. 96-342, § 804, 94 Stat. 1077, 1092 (Sept. 8, 1980). Thereafter, Congress repeatedly amended, extended, and reenacted both statutes. *See* Historical and Statutory Notes to 37 U.S.C. § 308. The government points to nothing in the legislative history of these enactments that would contradict the unequivocal statement in the 1980 report that the language was *not* intended to permit recoupment for physical fitness discharges.

Thus, in the half century of congressional use of the "voluntarily, or because of misconduct" standard, the only legislative history that expressly addresses this issue directly contradicts the government's position. Whatever the Congress that first used this language in 1951 may have thought, the evidence as to the intentions of the Congresses that have reenacted it since 1980 — which are the only ones whose intentions are relevant in this case — points in one direction only: toward petitioners' common-sense reading of the statute. The government's brief in opposition not only fails to account for this embarrassing fact; it fails even to address it.

4. Consistent with the statute's limitation of recoupment to discharges that are "voluntar[y]" or because of "miscon-

duct," the Defense Department's published Financial Management Regulations (FMRs) provide for recoupment in the case of a weight or fitness discharge when the discharge is "upon the application or interest of the member." FMR 090503. Contending that the regulation is "ambiguous" because it does not expressly foreclose recoupment when a weight or fitness discharge is *not* requested by the service member, the government argues that the lower courts' reliance on unpublished agency memoranda and litigation affidavits merely reflects a conventional exercise of deference to an agency's construction of its own ambiguous regulation.[2]

The government, however, is unable to explain how a construction that requires recoupment for *all* weight and fitness discharges — thus dispensing altogether with (and rendering entirely superfluous) the phrase "upon the application or interest of the member" — could possibly be a permissible "construction" of any "ambiguity" in the relevant FMR. *See Fina Oil and Chemical Co. v. Norton*, 332 F.3d 672, 678 (D.C. Cir. 2003) (rejecting agency construction of regulation that rendered critical language superfluous or meaningless); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (court may not defer to agency construction that is "plainly erroneous or inconsistent with the regulation").

The government attempts to evade this principle by contending that it is the regulation itself that is meaningless because, according to the government, members may not apply for weight or fitness discharges. In fact, service regulations permit members to apply for discharge for any reason. *E.g.*, J.A. 405, 481. But even if they did not formally provide for such *applications*, nothing in them forbids a member to ask for or express an "interest" in receiving such a discharge. Indeed, in *Crane v. Secretary of Army*, 92 F. Supp. 2d 155 (W.D.N.Y. 2000), the *government* argued that a service

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[2] Of course, the agency's regulatory construction, even if proper, could not prevail over the unambiguous language of the statute.

member had *requested* that the basis for his discharge be changed to failure to meet weight standards — which would be impossible if, as the government now contends, members were forbidden to request such discharges in any fashion.

5. Most critically, the government's brief in opposition ignores that neither the decision below nor the Defense Department's recoupment policy even purports to reflect a "construction" of the *published* regulation. Rather, the lower courts accepted the government's argument that the *unpublished* Korb and Jehn memoranda are themselves regulations that prevail over the terms of the published regulation, which, according to the Defense Department, unaccountably fails to reflect accurately the intent of the memoranda as a result of an "apparent oversight." Govt. C.A. Br. 11.

As detailed in the petition for certiorari, the proposition, advanced by the government and accepted by the Federal Circuit below, that individuals may be adversely affected by the terms of unpublished regulations is contrary both to a federal statute (5 U.S.C. § 552(a)) and to this Court's holding in *Morton v. Ruiz*, 415 U.S. 199 (1974). *The government's brief in opposition offers no response at all on this point.*

The closest the government comes to addressing this issue is to say that the Korb and Jehn memoranda were not required to undergo notice-and-comment rulemaking under 5 U.S.C. § 553 — a point petitioners have acknowledged. *Compare* Govt. Br. 20-21 n.15 *with* Pet. 17. But § 553's requirement that *some* rules be put out for public comment before they are *issued* is wholly separate from § 552(a)'s requirement that *any* rule that adversely affects a member of the public be published before it is *applied*. The government points to no legal principle that would excuse the Korb and Jehn memoranda from this basic administrative-law precept.[3]

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[3] The government concedes the memoranda were unpublished but says they were not "secret" because *one* was cited in the FMR's bibliography. But the government itself was not aware of the memo's contents

(*Footnote continued*)

Indeed, the government's brief in opposition is bereft of citation to any authority of any kind for what the Federal Circuit did in this case: namely, subordinate a published agency regulation to substantially different unpublished memoranda. Even the government admits that the published regulation "inartfully" reflects the unpublished memoranda (Govt. Br. 19, n.12) — a considerable understatement, to say the least. But the government cites not a single precedent that permits the terms of unpublished, internal agency memoranda to displace those of published regulations whenever the regulations are "inartfully" drawn. As one court has put it, "[a]lthough Congress gave the Secretary discretion in adopting appropriate regulations, it assuredly did not license the Secretary to publish one set of criteria and to apply another." *Schumacher v. Aldridge*, 665 F. Supp. 41, 53 (D.D.C. 1987).[4]

6. The government denies that the lower courts' decision granted *Chevron-Mead* deference to an interpretation set forth only in litigation affidavits. Govt. Br. 16 n.10. But the courts did just that. The opinion below makes clear that the

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until this case. J.A. 384. Its bare citation did not make its contents public and thus did not satisfy § 552(a) as to it, let alone as to the other one.

[4] The government also has no answer to the points that the published FMR was promulgated by the Under Secretary of Defense (who is not a subordinate of the long-departed Assistant Secretaries whose memoranda the government claims have the force of law) and that the FMR expressly supersedes *all* prior directives, which includes the memoranda. The government's claim that the "supersession argument" was not timely raised (Govt. Br. 19 n.13) is absurd. Throughout this litigation, petitioners have claimed that the published regulation governs. The argument that it expressly supersedes all other directives is additional support for that claim, not an issue requiring separate preservation. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Moreover, the government's view that a party's failure to raise an argument can justify a court in applying a superseded regulation is erroneous. As Judge Ginsburg of the D.C. Circuit recently observed, applying the wrong law because of a party's waiver would lead the courts to "til[t] at a non-existent windmill." *Ranger Cellular v. FCC*, __ F.3d __, __, 2003 WL 21495159 (D.C. Cir. July 1, 2003).

courts considered *both* the published FMR *and* the unpublished Korb and Jehn memoranda too ambiguous to support the position taken by the agency. Pet. App. 20a-21a. Only by considering the agency's affidavits were the courts able to discern the agency's view (Pet. App. 21a), to which they then proceeded to defer — not as a construction of the agency's own regulation, but as a construction of the governing *statute* under *Chevron* and *Mead*. Pet. App. 21a-22a.

Tellingly, not even the government is willing to argue that granting *Chevron-Mead* deference to such materials is proper and or to deny that doing so would conflict with decisions of other circuits. *See* Govt. Br. 16-17 n.10; *see also* Pet. 19 (citing authority refusing deference to such materials). Thus, once the government's unconvincing denial that the lower courts afforded deference to these materials is set aside, it has no further defense to offer on this point.

7. In a final attempt to deny that this case merits review, the government lamely asserts that the Department of Defense has "advised" that it "plans to revise the FMR" to conform to its view of the statute. Govt. Br. 21. Of course, the Department has had ample opportunity to revise its regulation since being alerted by this litigation to the FMR's "inartful" expression of the Department's position, but, astonishingly, the Department repromulgated the FMR unchanged in 2002 (*after* the decision of the Court of Federal Claims). The Department's belated resolution to clean up its act only when faced with a petition for certiorari is hardly reassuring.

In any case, revision of the regulation will not alter the fact that the Department's recoupment practices are incompatible with the statutes, and it will do nothing to resolve the disagreement among the lower courts over the proper interpretation of the statutes. Nor will it rectify the impropriety, under the *existing* FMR as well as the statutes, of the Department's recoupment of bonuses from the thousands of members of this class. And, perhaps most significantly, amendment of the regulation will have no effect on the im-

portance of reviewing and correcting the precedent set by the Federal Circuit in this case, which sharply departs from established administrative law principles in giving unpublished memoranda precedence over published regulations and affording *Chevron-Mead* deference to internal and litigation-generated agency materials.

CONCLUSION

Through bonus payments, the government induced petitioners and thousands like them to join or remain in the armed forces, knowing that the bonuses were critical to providing them "the means to place a down payment on a home, to pay tuition bills, or to make necessary family purchases." H.R. Rep. No. 99-81, at 230 (May 10, 1985), *reprinted in* 1985 U.S.C.C.A.N. 472, 505. Despite their willingness to serve, their undoubted ability to serve usefully in many capacities, and their efforts to meet the services' physical standards, the services then not only expelled them, but sought to reach into their pockets on the fiction that they quit "voluntarily." The proper treatment of these thousands of former service members, as well as the correct reading of the statutes and the application of fundamental principles of administrative law, are important matters that this case presents for resolution by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael A. Feldman
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

Scott L. Nelson
Counsel of Record
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

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